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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JENNY WANG, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; PAUL S. ZUCKERMAN et al., Real Parties in Interest.	B207513 (Los Angeles County Super. Ct. No. BC374917)

ORIGINAL PROCEEDING in mandate. Conrad R. Aragon, Judge. Petition granted.

Perona, Langer, Beck & Serbin, Ronald Beck and Alvin Chang for Petitioner.

No appearance for Respondent.

Law Offices of Jeffrey C. McIntyre and Jeffrey C. McIntyre for Real Parties in Interest.

In this mandate proceeding, Jenny Wang challenges an order granting a motion to compel arbitration of her legal malpractice action against her former attorney and his law firm. We conclude that the language of the arbitration clause in the retainer agreement petitioner signed when she retained the defendants is not broad enough to encompass a claim for legal malpractice. Accordingly, we grant the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Jenny Wang was involved in an auto accident. Sometime thereafter, she retained the Law Offices of Larry H. Parker, Inc. (the Parker firm), to represent her interests. According to Wang, the Parker firm made a $100,000 policy limits settlement demand on her behalf, but the other driver's insurer rejected the demand. The Parker firm then filed a personal injury action on Wang's behalf.

In March 2007, Wang hired the real parties in interest – Attorney Paul Zuckerman and his law firm, Carpenter & Zuckerman, LLP (collectively C&Z or the law firm) – to replace the Parker firm as her counsel. When Wang retained C&Z, she signed a two and one-half page "Legal Services Agreement" (the retainer agreement), the last paragraph of which contained the following arbitration provision:

> "**10. ARBITRATION REQUIRED IN THE EVENT OF DISPUTE**. In the event either party *disputes this Agreement*, an action or proceeding to enforce the same is required, or any dispute arises between Law Firm and Client *arising out of the subject matter of this dispute*, each party agrees to resolve any such dispute by binding arbitration, held before a mutually selected retired judge of the Los Angeles Superior Court." (Italics added.)

According to Wang, shortly after she retained C&Z, that firm "without [Wang's] knowledge or understanding of the significance, negligently and carelessly made another policy limits settlement demand of $100,000 on defendant's insurance carrier" which the carrier promptly accepted, "thereby destroying [Wang's] clear ability to get monies well over and above the stated policy limits. Because of the new timely tender of policy limits in response to [C&Z's] request, the 'excess bad faith' case against the defendant and his insurance company in the underlying case was destroyed."

Wang discharged C&Z and rehired the Parker firm, which allegedly finalized the details of the personal settlement.

In July 2007, Wang and the Parker firm filed this legal malpractice action against C&Z.

In late September 2007, C&Z filed an answer to the complaint, as well as a cross-complaint against the Parker firm. One of the many affirmative defenses listed in C&Z's answer was entitled "mandatory arbitration" and was based on the parties' retainer agreement.

A few days after C&Z filed its answer, it moved for judgment on the pleadings, claiming Wang's complaint did not allege she suffered any damages as a result of the alleged malpractice. It appears the Parker firm filed a demurrer to C&Z's cross-complaint at around the same time. Both matters were heard in early November 2007. The court denied C&Z's motion for judgment on the pleadings and sustained the Parker firm's demurrer to the cross-complaint, albeit with leave to amend. C&Z then filed an amended cross-complaint.

At around the same time, Wang propounded discovery on C&Z, but the law firm objected on the ground that it would be filing a petition to compel arbitration. In mid-January 2008, Wang's counsel demanded responses to the discovery and asserted that the arbitration provision was unenforceable. C&Z's counsel responded a few days later, asserting that the firm's affirmative defense based on the arbitration provision constituted a demand for arbitration, and adding that to the extent Wang's counsel disagreed, he should consider the letter to be a demand for arbitration.

In late January of this year, C&Z moved to compel arbitration pursuant to the arbitration provision in the retainer agreement.

Wang (and the Parker firm) opposed the motion, claiming (1) the plain terms of the arbitration provision do not cover a malpractice claim, (2) the agreement is unconscionable, and (3) C&Z waived the right to enforce the arbitration provision by failing to seek its enforcement earlier and by engaging in conduct that was inconsistent

with arbitration (such as filing a cross-complaint and a motion for judgment on the pleadings).

After a brief hearing, the trial court adopted its tentative ruling, which granted the motion based on the court's conclusion "that the matter is arbitrable, that there has been no waiver, [and] that the agreement is not unconscionable either procedurally or substantively . . . ." The court's minute order contained a more detailed explanation, and specifically rejected Wang's argument that the law firm had waived the right to seek enforcement of the arbitration provision. In explaining the ruling that the arbitration provision covered a malpractice claim, the minute order misstated the terms of that provision. According to the minute order, the agreement covers "disputes arising 'out of the subject matter' of the [retainer] agreement . . . ." In fact, however, the provision did not provide for arbitration of all disputes arising out of the subject matter of "the agreement." Rather, it provided for arbitration of all disputes arising out of the subject matter of "this dispute." As discussed more fully below, the only "dispute" referenced in the arbitration provision is one in which a party "disputes this Agreement."[1]

Wang filed a petition for a writ of mandate in which she challenges the trial court's ruling on the same grounds on which she opposed the law firm's motion in the trial court.

We issued an alternative writ, received additional briefing from the parties, and heard oral argument.

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[1] The Parker firm was not a signatory to Wang's retainer agreement with C&Z. Therefore, concurrently with its motion to compel arbitration, C&Z submitted a request for dismissal, without prejudice, of its cross-complaint against the Parker firm. C&Z stated it was not opposed to such a dismissal if the court granted the motion to compel arbitration. The trial court granted the request as part of its order compelling arbitration.

DISCUSSION

1. *Substantial Evidence Supports the Trial Court's Ruling That C&Z Did Not Waive the Right to Invoke the Arbitration Agreement.*

"Whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact, and a trial court's determination on that matter will not be disturbed . . . if supported by substantial evidence. [Citations.] . . . [W]e presume the trial court's order granting [a party's] petition to compel arbitration is correct, and it is the responsibility of [the party challenging that ruling] to show reversible error. [Citation.] [¶] Since arbitration is a strongly favored means of resolving disputes, courts must 'closely scrutinize any claims of waiver.' [Citations.] A party claiming that the right to arbitrate has been waived has a heavy burden of proof." (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 991.)

"In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]' " (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 992, original brackets.)

In claiming that C&Z waived the right to compel arbitration in this case, Wang relies heavily on *Sobremonte v. Superior Court*, *supra*, 61 Cal.App.4th 980, where the Court of Appeal reversed a ruling that a bank had not waived its right to enforce an arbitration clause. In that case, however, the bank had waited approximately 10 months after the complaint was filed before moving to compel arbitration. It did so after a trial

date had been set, after the parties had expended considerable resources on extensive discovery, and after numerous motions had been filed and argued (including a motion by the bank to transfer the case to the former municipal court based on the amount in controversy).

In this case, considerably less time had passed before C&Z moved to compel arbitration. Moreover, there is no evidence the parties had exchanged any discovery. (There is evidence that Wang served at least one discovery request on C&Z, but C&Z objected on the ground that it would be seeking to compel arbitration.) And while C&Z filed a motion for judgment on the pleadings, we cannot say this is enough to conclude there is no substantial evidence to support the trial court's finding that C&Z did not waive the right to invoke the arbitration clause.

2. *The Trial Court Erred in Concluding the Arbitration Provision Encompassed This Malpractice Action.*

"The standard of review for an order on a petition to compel arbitration is either substantial evidence where the trial court's decision on arbitrability was based upon the resolution of disputed facts, or de novo where no conflicting extrinsic evidence was admitted in aid of interpretation of the arbitration agreement." (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1448-1449.) In this case, the trial court did not rely on any extrinsic evidence in construing the arbitration provision in C&Z's retainer agreement. Therefore, this court reviews the question whether the provision encompasses a malpractice claim de novo.

" 'We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made.' [Citations.] 'A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.' [Citations.] 'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.' [Citation.]" [¶] 'In cases of uncertainty not removed by the preceding rules, the

language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.' [Citation.] Where the language in a contract is ambiguous, the contract should be interpreted most strongly against the party who prepared it. [Citations.]" (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111-1112; accord *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1507 (*Lawrence*) ["The arbitration clause in the present case was part of a retainer agreement drafted by defendant attorneys and presented to the plaintiff client for her signature. It was not the product of negotiation. '[The] language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.' (Civ. Code, § 1654.)"].)[2]

In support of her claim that the arbitration provision does not encompass a claim for legal malpractice, Wang relies on the Court of Appeal's decision in *Lawrence*, *supra*, 207 Cal.App.3d 1501. In that case, a law firm and four of its attorneys who had been sued for malpractice appealed an order denying their petition to compel arbitration.

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[2] C&Z cites the principle that "California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686.) However, as the Court of Appeal explained in *Bono v. David* (2007) 147 Cal.App.4th 1055, 1063, "there is another principle that needs to be considered. As our Supreme Court stressed several decades ago, the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration: 'Although "[t]he law favors contracts for arbitration of disputes between parties" [citation], " 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . .' " [Citations.] In determining the scope of an arbitration clause, "[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation]." [Citation.]' " (Quoting *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744, original brackets and ellipsis; accord *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481 ["There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable"].)

The defendants relied on an arbitration provision contained in the parties' three-page retainer agreement. The Court of Appeal described the retainer agreement as follows:

> "A retainer agreement, consisting of a three-page letter from defendants to plaintiff, states: 'This letter sets forth the agreement concerning our representation of you.' Thirteen numbered paragraphs follow. The first nine paragraphs concern the computation and payment of attorney's fees and costs. In paragraph 10, defendants promise to keep plaintiff informed of the progress of her case. Paragraph 11 then states: 'In the event of a dispute between us regarding fees, costs *or any other aspect of our attorney-client relationship*, the dispute shall be resolved by binding arbitration. The prevailing party in any arbitration or litigation between us shall be entitled to reasonable attorney's fees and costs.' The final two paragraphs contain a promise by defendants to conform 'to the highest legal and ethical standards,' and instructions to plaintiff to sign and return a copy of the letter." (*Lawrence, supra*, 207 Cal.App.3d at p. 1504, italics added.)

The defendants in *Lawrence* claimed that "inclusion of the phrase 'any other aspect of our attorney-client relationship' in the arbitration clause of the retainer agreement compels arbitration of '[*any*] dispute arising out of the attorney-client relationship,' including a claim of legal malpractice." (*Lawrence, supra,* 207 Cal.App.3d at p. 1505, original brackets.) The Court of Appeal agreed that "[i]f this phrase is considered standing alone, defendants' argument would be compelling." (*Id.* at p. 1506.) However, the court concluded that when the language was examined in the context of the entire agreement, the phrase should not be so construed:

> "The issue before us, however, is not whether the phrase 'any other aspect of our attorney-client relationship,' standing alone, would encompass an action for attorney malpractice, because in the retainer agreement at issue, these words do *not* stand alone. Instead, the phrase is one provision in an agreement devoted almost exclusively to financial matters and appears in a sentence which reads: 'In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration.' In this context, the arbitration clause appears to be limited to disputes concerning financial matters such as fees and costs and is most likely to be so viewed by a prospective client to whom the proposed agreement is tendered by the law firm." (*Ibid.*, fn. omitted.)

C&Z claims that *Lawrence* is distinguishable because, unlike its retainer agreement with Wang, the retainer agreement in *Lawrence* was devoted almost exclusively to financial matters.[3] We need not decide whether C&Z's retainer agreement as a whole is sufficiently distinguishable from the retainer agreement at issue in *Lawrence*. This is because the key language in C&Z's arbitration provision cannot be read to provide for arbitration of Wang's legal malpractice action.

The arbitration clause in the C&Z retainer agreement provided in pertinent part that "[i]n the event either party *disputes this Agreement*, an action or proceeding to enforce the same is required, or any dispute arises between Law Firm and Client *arising out of the subject matter of this dispute*, each party agrees to resolve any such dispute by binding arbitration, held before a mutually selected retired judge of the Los Angeles Superior Court." (Italics added.) C&Z maintains that "the plain language of th[is] arbitration provision is that it covers 'any such dispute' arising out of the parties' legal services agreement." (Capitalization and underscoring omitted.) We disagree.

The first part of the arbitration clause provides that arbitration is required where either party "disputes this Agreement." By its plain terms, the most plausible construction of this language is that arbitration is required when either party disputes the existence of the agreement. We cannot see how a "dispute [over] this agreement" can be construed as a dispute concerning the quality of the legal services provided by the firm (including a claim for legal malpractice).

The arbitration clause goes on to talk about arbitration of "any dispute [that] arises between Law Firm and Client arising out of the subject matter of *this dispute*." (Italics added.) By definition, "this dispute" must be a reference to a dispute referenced earlier in

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3 C&Z also seeks to distinguish *Lawrence* on the ground that the retainer agreement in that case did not contain an integration clause. As a factual matter, it is not clear the retainer agreement in *Lawrence* did not contain such a clause. But even assuming the agreement did not contain an integration clause, the absence of such a clause played no role in the Court of Appeal's decision. The Court of Appeal appeared to base its holding solely on the language of the retainer agreement, not on any parole evidence.

the arbitration clause. The only "dispute" referenced earlier in the arbitration clause is the one discussed above, i.e., the one in which "either party *disputes this Agreement*." Read literally, "this dispute" can only be read as referring to a dispute regarding the existence of the agreement, and perhaps also to a dispute involving the enforceability of the agreement or any of its terms. It cannot be read as encompassing a dispute over the quality of the legal services provided by the firm (including a claim for legal malpractice). This is especially true when we keep in mind that any uncertainty must be construed against the party that drafted the agreement, i.e., C&Z.[4]

Accordingly, we hold that the arbitration clause in this case is not broad enough to encompass a claim for legal malpractice.

DISPOSITION

The petition for writ of mandate is granted. The respondent court is directed to vacate its March 21, 2008 order granting the motion of real parties in interest to compel arbitration of petitioner's legal malpractice action, and to thereafter enter a new and different order denying the motion. Petitioner is entitled to recover her costs in this writ proceeding. (Cal. Rules of Court, rule 8.490(m)(1)(A).)

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BIGELOW, J.

We concur:

RUBIN, Acting P. J. FLIER, J.

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[4] Conceivably, the retainer agreement contains a typographical error. Perhaps the law firm meant to say that arbitration is required when there is a dispute "arising out of the subject matter of this *Agreement*," not any dispute "arising out of the subject matter of this *dispute*." However, the error – which would not necessarily be obvious to a layperson – cannot be held against Wang. The law firm drafted the agreement and any ambiguities must be construed against the firm.